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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MAINE STATE RETIREMENT
SYSTEM, Individually and On Behalf
of All Others Similarly Situated,

Plaintiffs,

v.

COUNTRYWIDE FINANCIAL
CORPORATION, et al.,

Defendants.

Case No. 2:10-CV-00302-MRP (MANx)

**COUNTRYWIDE DEFENDANTS'
RESPONSE TO PLAINTIFFS'
SUBMISSION AT MARCH 23, 2011
HEARING**

Courtroom: 12
Judge: Hon. Mariana R. Pfaelzer

PRELIMINARY STATEMENT

At the late March 2011 hearing on the Countrywide Defendants' tranche-based standing and tolling arguments in support of their pending motions to dismiss, Plaintiffs submitted a binder of supplemental materials to the Court that previously had not been shared with or provided to Defendants. During the hearing, the Court granted the Countrywide Defendants permission to file a response to those supplemental materials. *See* March 23, 2011 Hr'g Tr. at 9, 54. The Countrywide Defendants respectfully submit this short response.

ARGUMENT

I. Tranches Were Backed By Different Loan Groups And Loan Types.

Plaintiffs' Tab A,¹ entitled "Common Characteristics Across Loan Groups," underscores that many of the MBS tranches at issue were backed by *different loan groups*, several of which were comprised of *different types of loans* and also *performed differently*. For instance, Plaintiffs' Tabs A-1, A-2, and A-3 show that:

- Ten of the 14 Offerings at issue consisted of tranches that were backed by two, three, four, or five distinct subgroups of different loans (Tab A-1);
- Five of the Offerings consisted of tranches that were backed by different *types* of loans compared to other tranches in the same Offering. *See, e.g.*, CWABS 2005-11 (Loan Group 1: fixed rate; Loan Group 2: conforming balance fixed and adjustable rate; Loan Group 3: adjustable rate); CWABS 2006-11 (Loan Group 1: fixed rate; Loan Group 2: conforming balance fixed and adjustable rate; Loan Group 3: fixed and adjustable rate); CWABS 2005-HYB9 (Loan Group 1: 3-year fixed rate; Loan Groups 2, 3 and 5: 5-year fixed rate; Loan Group 4: 7-year fixed rate) (Tab A-1);
- Two of the Offerings consisted of tranches backed by loan groups that, to differing extents, were originated by lenders other than Countrywide, pursu-

¹ References to "Tabs" are to the dividers in the binder of materials Plaintiffs submitted to the Court at the hearing.

1 ant to different underwriting guidelines (Tab A-2; *see also* Countrywide
2 Defs.’ Supp. Brief Ex. 14 at 406-425); and

- 3 • All of the loan groups within each Offering are performing differently, and
4 have different delinquency rates—several of which are significantly differ-
5 ent. This is not surprising given that each group is composed of a unique set
6 of loans. *Compare* CWABS 2005-11 Loan Group 1 (42.34%) with Loan
7 Group 3 (70.82%); CWMBBS 2006-HYB3 Loan Group 1 (50.82%) with
8 Loan Group 4 (31.26%); CWABS 2005-HYB9 Loan Group 3 (29.00%) with
9 Loan Group 5 (46.69%) (Tab A-3).

10 Given these differences, Plaintiffs’ Tab A confirms that standing and tolling
11 must be evaluated on a tranche-by-tranche basis. Although each tranche was offered
12 pursuant to a single prospectus supplement, the point of reference for the statements in
13 any such prospectus supplement regarding underwriting and origination practices was
14 the specific loans backing the specific certificates (tranches) at issue. And those loans
15 (and thus the statements regarding those loans) varied from loan group to loan group
16 and from tranche to tranche. By definition, an alleged misstatement regarding the un-
17 derwriting of particular loans is only relevant to—and can only cause injury to—
18 investors who purchased certificates backed by those particular loans.

19 Plaintiffs’ Tab A charts assert that these differences should be ignored because
20 the types of loans, originators, and delinquency rates supposedly are “[the] same or
21 similar” across loan groups. That is wrong for two reasons. First, as detailed above,
22 Tab A itself reveals substantial differences across the various loan groups. Second,
23 even if some similarities exist, they are not legally relevant. Standing (and in turn, the
24 scope of any potential tolling) depends on injury. Here, Plaintiffs allege they were in-
25 jured by statements regarding loan underwriting that were supposedly untrue. To the
26 extent those statements were made about loans backing tranches that Plaintiffs did not
27 purchase, Plaintiffs could not have been injured by those particular statements (even if
28 they happened to buy another tranche backed by “similar” loans) because the loans

1 these statements reference do not back the securities Plaintiffs purchased. Plaintiffs
2 therefore lack standing to challenge those statements. Any other conclusion could not
3 be reconciled with the holding of this Court and many other courts that language in a
4 common shelf registration statement cannot confer standing on investors who pur-
5 chased MBS backed by different loans in different offerings pursuant to that same reg-
6 istration statement. *See* Nov. 4, 2010 Order at 7 (Plaintiffs lack standing to sue as to
7 Offerings in which they did not purchase because “[e]ach MBS is backed by a pool of
8 unique loans”).

9 **II. Plaintiffs’ Charts Misstate How Cash Flow Is Distributed Among Tranches.**

10 Plaintiffs’ Tab B, entitled “Common Impact of Misstatements Across All
11 Tranches,” mischaracterizes how the cash flows generated by different loan groups are
12 distributed to different MBS tranches. Plaintiffs argue that the charts in Tab B show
13 that “each offering . . . is like a ship, a cruise ship with many floors,” where “there
14 was a rupture and the water”—*i.e.*, losses—“starts flowing in from the bottom.” Mar.
15 23, 2011 Hr’g Tr. at 11-12.² The charts then depict “water” flowing from all loan
16 groups towards all tranches, suggesting that the alleged misstatements had a “common
17 impact” on all tranches of each Offering regardless of which loan group backed which
18 tranche. *See* Tabs B-1, B-2, B-3.

19 As an initial matter, Plaintiffs’ charts at Tab B demonstrate that the vast major-
20 ity of the tranches in the Offerings depicted *have not suffered any realized losses at*
21 *all*. More specifically, 14 of the 21 tranches in CWALT 2005-62 (Tab B-1), 12 of the
22 13 tranches in CWMBS 2005-HYB9 (Tab B-2), and 18 of the 23 tranches in CWABS
23 2006-9 (Tab B-3) have “Cumulative Realized Losses” of *zero*. In other words, all dis-
24 tributions of principal and interest owed to purchasers of those tranches have been




25
26 ² Plaintiffs made a similar analogy at the October 18, 2010 motion to dismiss hearing,
27 which this Court rejected: “[COUNSEL:] [T]hat’s like saying to the people in the
28 first-class deck on the Titanic, don’t worry. You are way up here on the top deck of
this ship. [THE COURT:] It’s not the same thing at all. It’s a tranche. It’s an in-
vestment. It does what it does.” Oct. 18, 2010 Hr’g Tr. at 89.

1 made to date, and such purchasers have received exactly what they bargained for and
2 have not suffered any legally cognizable injury. *See* Countrywide Defs.’ Mem. In
3 Support Of Mot. To Dismiss at 41-49; Reply In Support Of Mot. To Dismiss at 37-43.
4 Moreover, the fact that some tranches have incurred losses and others have not con-
5 firms that each tranche is a fundamentally different security, with a fundamentally dif-
6 ferent risk profile, that is subject to fundamentally different alleged injury for pur-
7 poses of standing and tolling.

8 Plaintiffs’ Tab B charts are also founded on a fundamentally incorrect factual
9 premise. Contrary to what those charts appear to depict, the cash flows generated by
10 the underlying loans (and, by extension, any losses resulting from insufficient cash
11 flows) do not flow collectively from all loan groups to all tranches. Instead, as the
12 Countrywide Defendants’ supplemental briefing explained, different tranches are
13 backed by different loan groups, and the cash flows are distributed accordingly. Thus,
14 a more accurate depiction of the structure of these three Offerings is as follows (the
15 first chart that follows corresponds to the first chart appearing in Tab B of Plaintiffs’
16 binder, the second chart that follows to the second chart in Tab B, and so on):

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CWALT 2005-62

	Class	Original Balance	Monthly Beginning Balance	Total Distribution	Cumulative Realized Losses	Ending Balance
Group 1 	1A1	262,595,000.00	149,180,345.19	617,530.51	0.00	148,624,368.82
	1A2	175,064,000.00	99,510,922.18	552,993.07	0.00	99,140,057.50
	1X1	262,595,000.00	149,634,160.44	300,398.81	0.00	149,078,184.07
	1X2	175,064,000.00	99,926,290.13	59,593.58	0.00	99,555,425.45
	1X3	175,064,000.00	99,511,232.06	1,328.03	0.00	99,140,367.38
Group 2 	2A1	408,902,000.00	123,609,553.91	1,826,545.34	0.00	121,919,425.25
	2A2	185,000,000.00	55,924,812.00	825,456.66	0.00	55,160,145.16
	2A3	195,934,000.00	59,239,646.81	907,608.25	0.00	58,429,655.82
	2A4	200,000,000.00	60,459,256.21	894,394.96	0.00	59,632,589.35
	2X1	989,836,000.00	301,633,784.85	387,015.63	0.00	297,542,331.50
	2X2	989,836,000.00	299,233,268.93	19,893.88	0.00	295,141,815.58
Groups 1 and 2 	MX	176,431,765.00	58,936,785.56	106,364.64	0.00	55,392,652.05
	M1	27,267,000.00	24,574,277.89	102,231.31	0.00	24,489,846.47
	M2	24,861,000.00	22,407,274.08	94,463.99	0.00	22,330,287.92
	M3	16,039,000.00	11,564,765.71	49,490.23	6,233,889.04	8,183,391.30
	M4	13,633,000.00	0.00	0.00	12,588,443.00	0.00
	M5	12,029,000.00	0.00	0.00	11,491,804.19	0.00
	M6	12,029,000.00	0.00	0.00	11,639,256.42	0.00
	M7	9,624,000.00	0.00	0.00	9,429,321.23	0.00
	B1	8,822,000.00	0.00	0.00	8,726,437.83	0.00
	B2	8,020,000.00	0.00	0.00	7,940,829.45	0.00
Total		4,328,645,765.00	1,615,346,375.95	6,745,308.89	68,049,981.16	1,593,760,543.62

Group 1

"Loan group 1 consists of 30-year conventional, adjustable rate, negative amortization mortgage loans secured by first liens on one-to four-family residential properties."

Countrywide Home Loans, Inc. 100%
Current Delinquency Rate: 63.86%

Group 2

"Loan group 2 consists of 30-year conventional, adjustable rate, negative amortization mortgage loans secured by first liens on one-to four-family residential properties."

Countrywide Home Loans, Inc. 100%
Current Delinquency Rate: 62.45%

Mortgage Loan Pool

CWHL 2005-HYB9

	Class	Original Balance	Monthly Beginning Balance	Principal Distribution	Cumulative Realized Losses	Ending Balance
Group 1	1A1	99,025,000.00	41,042,998.06	1,290,104.93	0.00	39,752,893.13
	1A2	11,003,000.00	4,560,425.23	143,347.89	0.00	4,417,077.34
Group 2	2A1	187,498,000.00	95,589,964.86	555,840.48	0.00	95,034,124.38
	2A2	20,833,000.00	10,621,050.55	61,759.72	0.00	10,559,290.83
Group 3	3A1A	210,000,000.00	101,805,487.59	1,383,350.95	0.00	100,422,136.64
	3A1B	23,333,000.00	11,311,559.25	153,703.47	0.00	11,157,855.78
	3A2A	189,902,000.00	92,062,217.63	1,250,957.68	0.00	90,811,259.95
	3A2B	53,563,000.00	25,966,701.58	352,840.13	0.00	25,613,861.45
Group 4	4A1	133,025,000.00	76,954,602.38	2,845,247.77	0.00	74,109,354.61
	4A2	14,780,000.00	8,550,190.02	316,126.76	0.00	8,234,063.26
Group 5	5A1	101,176,000.00	49,826,950.38	250,251.92	0.00	49,576,698.46
	5A2	28,537,000.00	14,053,843.62	70,584.32	0.00	13,983,259.30
Groups 1, 2, 3, 4, and 5	M1	16,279,000.00	6,500,530.40	200,692.29	11,415,291.77	3,659,210.48
	Total	1,088,954,000.00	538,846,521.55	8,874,808.31	11,415,291.77	527,331,085.61

Group 1	Group 2	Group 3	Group 4	Group 5
<p>"Loan group 1 consists of mortgage loans that initially have a fixed rate of interest for <u>three years</u> following their origination, and thereafter have an adjustable rate of interest for the remaining life of the loan."</p> <p>Countrywide 41.97% Sierra Pacific 1.43% AmNet 28.47%</p> <p>Current Delinquency Rate: 33.65%</p>	<p>"Loan group 2 consists of mortgage loans that initially have a fixed rate of interest for <u>five years</u> following their origination, and thereafter have an adjustable rate of interest for the remaining life of the loan."</p> <p>Countrywide 28.51% Sierra Pacific 0.60% AmNet 13.26%</p> <p>Current Delinquency Rate: 39.61%</p>	<p>"Loan group 3 consists of mortgage loans that initially have a fixed rate of interest for <u>five years</u> following their origination, and thereafter have an adjustable rate of interest for the remaining life of the loan."</p> <p>Countrywide 63.57% Sierra Pacific 0.25% AmNet 4.11%</p> <p>Current Delinquency Rate: 29.00%</p>	<p>"Loan group 4 consists of mortgage loans that initially have a fixed rate of interest for <u>seven years</u> following their origination, and thereafter have an adjustable rate of interest for the remaining life of the loan."</p> <p>Countrywide 59.75% Sierra Pacific 0.37% AmNet 0.34%</p> <p>Current Delinquency Rate: 31.94%</p>	<p>"Loan group 5 consists of mortgage loans that initially have a fixed rate of interest for <u>five years</u> following their origination, and thereafter have an adjustable rate of interest for the remaining life of the loan."</p> <p>Countrywide 12.84% Sierra Pacific 29.60% AmNet 12.55%</p> <p>Current Delinquency Rate: 46.89%</p>

Mortgage Loan Pool

CWL 2006-9

	Class	Original Balance	Monthly Beginning Balance	Principal Distribution	Cumulative Realized Losses	Ending Balance
Group 1	1AF1	57,182,000.00	0.00	0.00	0.00	0.00
	1AF2	11,453,000.00	8,029,428.07	934,742.00	0.00	7,094,686.07
	1AF3	33,773,000.00	33,773,000.00	0.00	0.00	33,773,000.00
	1AF4	9,068,000.00	9,068,000.00	0.00	0.00	9,068,000.00
	1AF5	13,310,000.00	13,310,000.00	0.00	0.00	13,310,000.00
Group 2	1AF6	17,200,000.00	16,332,618.05	93,900.17	0.00	16,238,717.88
	2AV	118,400,000.00	39,849,689.39	434,394.35	0.00	39,415,295.04
Group 3	3AV1	105,239,000.00	0.00	0.00	0.00	0.00
	3AV2	26,793,000.00	0.00	0.00	0.00	0.00
	3AV3	67,812,000.00	63,131,410.12	1,348,220.17	0.00	61,783,189.95
	3AV4	24,156,000.00	24,156,000.00	0.00	0.00	24,156,000.00
Group 1	MF1	5,332,000.00	5,332,000.00	0.00	0.00	5,332,000.00
	MF2	4,816,000.00	4,816,000.00	0.00	0.00	4,816,000.00
	MF3	2,838,000.00	2,838,000.00	0.00	0.00	2,838,000.00
	MF4	2,580,000.00	2,580,000.00	0.00	0.00	2,580,000.00
	MF5	2,580,000.00	2,580,000.00	0.00	0.00	2,580,000.00
	MF6	2,236,000.00	664,701.93	0.00	2,209,244.29	26,755.71
Groups 2 and 3	MV1	15,622,000.00	15,622,000.00	0.00	0.00	15,622,000.00
	MV2	14,124,000.00	14,124,000.00	0.00	0.00	14,124,000.00
	MV3	8,346,000.00	3,028,063.42	0.00	7,720,223.63	625,776.37
	MV4	7,276,000.00	0.00	0.00	7,276,000.00	0.00
	MV5	7,062,000.00	0.00	0.00	7,062,000.00	0.00
	MV6	6,634,000.00	0.00	0.00	6,634,000.00	0.00
Total		563,832,000.00	259,234,910.98	2,811,256.69	30,901,467.92	253,383,421.02

<p style="text-align: center;">Group 1</p> <p>"Loan group 1 consists of first lien fixed rate mortgage loans."</p> <p>Countrywide Home Loans, Inc. 100% Current Delinquency Rate: 50.12%</p>	<p style="text-align: center;">Group 2</p> <p>"Loan group 2 consists of first lien fixed and adjustable rate mortgage loans."</p> <p>Countrywide Home Loans, Inc. 100% Current Delinquency Rate: 57.41%</p>	<p style="text-align: center;">Group 3</p> <p>"Loan group 3 consists of first lien fixed and adjustable rate mortgage loans."</p> <p>Countrywide Home Loans, Inc. 100% Current Delinquency Rate: 56.00%</p>
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Mortgage Loan Pool

These corrected versions of Plaintiffs' charts highlight that the purchaser of a tranche backed by one loan group cannot be injured by an alleged misstatement as to the underwriting of the loans in another loan group. This is because an alleged misstatement as to the loans underlying one loan group (and one tranche) cannot cause any disruption in the cash flows generated by a different loan group (backing a different tranche).³ Indeed, a comparison of Plaintiffs' chart for CWABS 2006-9 (Tab B-3) with the chart above confirms Plaintiffs' error. In Tab B-3, Plaintiffs' "water line" rises as high as Class MF-6, and covers Classes MV-1 and MV-2 (which are the rows

³ Plaintiffs have argued that the various tranches are "interconnected" by credit enhancement mechanisms. As the Countrywide Defendants explained in their supplemental briefing and at the March 23 hearing, however, reduced credit enhancement cannot create loss for a tranche that is not already incurring losses. Thus, the primary cause of any alleged injury to each tranche would still be the specific loan group backing that tranche. See Supp. Reply Br. at 6-9; Mar. 23, 2011 Hr'g Tr. at 57-59.

below Class MF-6). Classes MV-1 and MV-2, however, have not incurred any losses. The corrected chart above shows why these losses have not occurred in all tranches: Class MF-6 is backed by Loan Group 1, while Classes MV-1 and MV-2 are backed by Loan Groups 2 and 3. The cash flows generated by Loan Groups 2 and 3 have been sufficient to make all required distributions to Classes MV-1 and MV-2, but the cash flows generated by Loan Group 1 have been unable to fund all distributions owed to Class MF-6.⁴

CONCLUSION

Far from showing that the tranches in the various offerings in which Plaintiffs allegedly purchased were supported by similar loans and experienced collective injury from the alleged misstatements, Plaintiffs' charts *actually* demonstrate substantial differences among the tranches that were offered in each deal. Plaintiffs' charts also highlight that the losses experienced by certificates varied according to the tranches they purchased, which were typically backed by unique groups of loans. As such, any

⁴ Plaintiffs' recent submission of *New Jersey Carpenters Health Fund v. NovaStar Mortg., Inc.*, No. 08-CV-5310-DAB (Mar. 31, 2011) ("*NovaStar*"), and *Employees' Ret. Sys. of the Govt. of the Virgin Islands v. J.P. Morgan Chase & Co., Inc.*, No. 09-CV-3701-JGK, 2011 U.S. Dist. LEXIS 33498 (S.D.N.Y. Mar. 30, 2011) ("*J.P. Morgan*"), in support of their argument against tranche-based standing and tolling is misplaced. As in the other MBS standing cases Plaintiffs cite, tranche-based standing and tolling were neither argued by the parties nor analyzed by the courts in *NovaStar* and *J.P. Morgan*. (The *NovaStar* defendants' dismissal briefs contain only a single footnote that states matter-of-factly that plaintiff had standing only with respect to the one certificate it bought. Nothing else was said on that point by either party.) Instead, as Plaintiffs themselves note in their Notice of Supplemental Authority, the *NovaStar* court dismissed plaintiff's 1933 Act claims because plaintiff failed to *tie* its allegations to the origination practices relating to the loans underlying the specific offering and tranche it purchased. *See* Dkt. No. 252 at 2 n.2, *NovaStar* slip op. at 26 ("Plaintiff fail[ed] to make allegations specific to the NovaStar Defendants' origination practices that relate to the only *offering* that is relevant here."). (Emphasis added.) Plaintiffs here similarly fail to tie any of the challenged loan underwriting or origination practices to the offerings or tranches they bought—or to any other offerings or tranches. The SAC should be dismissed for this reason as well. In addition, *NovaStar* and *J.P. Morgan* contain other holdings that support dismissal of the SAC on various grounds (including dismissal of conclusory allegations based on news articles and other investigations, dismissal of appraisal and LTV-related allegations as inactionable subjective opinions, dismissal of Section 12(a)(2) claims for failure to allege a purchase in the initial offering and failure to allege that the defendants were statutory "sellers," and dismissal of Section 15 claims for failure to allege control person liability), to which Defendants respectfully refer the Court.

1 tolling based on the filing of the *Luther* class action should be limited to only those
2 tranches purchased by the *Luther* named plaintiffs, and the standing of Plaintiffs here
3 similarly should be limited to only those tranches actually purchased by Plaintiffs.
4 For these reasons, and for all of the reasons set forth in the prior briefing and argu-
5 ment in support of their motion to dismiss, the Countrywide Defendants respectfully
6 request that all claims related to MBS tranches not purchased by the named plaintiffs
7 in *Luther* or by Plaintiffs here be dismissed with prejudice.

8
9 Dated: April 8, 2011

GOODWIN PROCTER LLP

/s/ Brian E. Pastuszewski

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Counsel for the Countrywide Defendants

PROOF OF SERVICE

I, Gareth J. Oania, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 601 S. Figueroa Street, Los Angeles, CA 90017.

On April 8, 2011, I served the following documents by placing a true copy thereof in a sealed envelope(s) on the persons listed on the service list below:

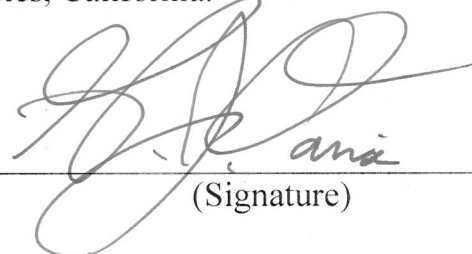
COUNTRYWIDE DEFENDANTS' RESPONSE TO PLAINTIFFS' SUBMISSION AT MARCH 23, 2011 HEARING

- ☒ (CM/ECF Electronic Filing) I caused the above document(s) to be transmitted to the office(s) of the addressee(s) listed above by electronic mail at the e-mail address(es) set forth above pursuant to Fed.R.Civ.P.5(d)(1). "A Notice of Electronic Filing (NEF) is generated automatically by the ECF system upon completion of an electronic filing. The NEF, when e-mailed to the e-mail address of record in the case, shall constitute the proof of service as required by Fed.R.Civ.P.5(d)(1). A copy of the NEF shall be attached to any document served in the traditional manner upon any party appearing pro se."

I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction this service was made and that the foregoing is true and correct.

Executed on April 8, 2011, at Los Angeles, California.

Gareth J. Oania
(Type or print name)


(Signature)

SERVICE LIST

**MAINE STATE RETIREMENT SYSTEM v.
COUNTRYWIDE FINANCIAL CORPORATION, et al.**

CASE NO. CV-10-00302-MRP-(MAN)

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